No. 46352-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Devennice Gaines,

Appellant.

Pierce County Superior Court Cause No. 12-1-01384-7

The Honorable Judge Thomas Felnagle

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The court violated Mr. Gaines's Sixth and Fourteenth Amendment right to an impartial jury.
2. The court violated Mr. Gaines's Wash. Const. art. I, § 22 right to an impartial jury.
3. The court violated Mr. Gaines's Fourteenth Amendment right to due process.
4. The court abused its discretion by applying the wrong legal standard to Mr. Gaines's motion for a mistrial after the jury was exposed to prejudicial extrinsic information.
5. The court abused its discretion by applying the wrong legal standard to determine whether the jury's exposure to extrinsic information was harmless.

> **ISSUE 1:** When extrinsic information injected into a jury's deliberations could impact the verdict, the trial court must declare a mistrial. Did the court violate Mr. Gaines's right to an impartial jury by denying his mistrial motion when jurors heard that a conviction would be Mr. Gaines's "third strike" (which was not accurate), and at least one juror also heard that Mr. Gaines had a prior manslaughter conviction?

6. The court violated Mr. Gaines's Sixth and Fourteenth Amendment right to an impartial and unanimous jury.
7. The court violated Mr. Gaines's Wash. Const. art. I, § 21 right to trial by jury.
8. The court erred by dismissing Juror 2 after learning that he favored acquittal.
9. The court committed structural error by dismissing Juror 2.

> **ISSUE 2:** Once a court becomes aware of a deliberating juror's views of the merits of a case, that juror cannot be dismissed for misconduct unless she or he is unable to deliberate impartially. Did the court violate Mr. Gaines's right to a unanimous verdict by dismissing Juror 2 – who injected extrinsic information into deliberations while arguing for Mr. Gaines's innocence – without asking whether he could put the information aside and deliberate fairly?

10. Prosecutorial misconduct denied Mr. Gaines his Sixth and Fourteenth Amendment right to a fair trial.

11. The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by "testifying" to "facts" not in evidence during closing argument.

> **ISSUE 3:** A prosecutor commits misconduct by "testifying" to "facts" not in evidence during argument. Did the prosecutor commit misconduct by attributing statements to Mr. Gaines that were not in evidence and that made it appear as though Mr. Gaines had planned to murder Price?

12. The court violated Mr. Gaines's Sixth and Fourteenth Amendment right to confront adverse witnesses.

13. The court violated Mr. Gaines's art. I, § 22 right to confront adverse witnesses.

14. The court erred by prohibiting Mr. Gaines from cross-examining Thomas regarding a significant source of potential bias.

15. The court erred by prohibiting Mr. Gaines from cross-examining Thomas on a matter affecting her credibility.

> **ISSUE 4:** An accused person must be permitted to cross-examine the state's witnesses regarding bias and matters affecting credibility. Did the court violate Mr. Gaines's confrontation right by prohibiting questions about the timing of Thomas's statements to the prosecutor, which she made while charged with Price's murder?

16. The court erred by prohibiting Mr. Gaines from cross-examining McVea regarding his motive to lie about being armed during Price's shooting.

> **ISSUE 5:** The confrontation clause requires that an accused person be permitted to cross-examine state witnesses about their motivation to lie. Did the court violate Mr. Gaines's confrontation right by barring questions about McVea's felony convictions, offered to show why McVea would lie about being armed during the shooting?

17. The court violated Mr. Gaines's Fourteenth Amendment due process right to present a defense.

18. The court should have allowed Mr. Gaines to present "other suspect" evidence implicating Green.

19. The court erred by prohibiting Mr. Gaines from presenting evidence of Green's habit for carrying a small gun.

> **ISSUE 6:** Due process includes the right to present relevant, admissible evidence in one's defense. Did the court violate Mr. Gaines's right to present a defense by prohibiting him from introducing evidence of Green's habit for carrying a small gun to support his theory that she was the real shooter?

20. The court erred by denying Mr. Gaines's motion to dismiss the charges against him based on governmental mismanagement.

> **ISSUE 7:** A criminal charge must be dismissed when governmental mismanagement prejudices the rights of the accused. Should the court have dismissed the case when government mismanagement forced Mr. Gaines to choose between his rights to a speedy trial and to be free from double jeopardy, and his right to adequately-prepared counsel?

21. The court erred by ordering Mr. Gaines to pay $1,900 in legal financial obligations absent any individualized inquiry into his ability to pay.

22. The court erred by entering finding of fact 2.5 CP 487.

> **ISSUE 8:** A court may not order a person to pay legal financial obligations (LFOs) without conducting an individualized inquiry into his/her means to do so. Did the court err by ordering Mr. Gaines to pay $1,900 in LFOs, while also finding him indigent and without analyzing whether he had the money to pay?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. The Global Grinders motorcycle club hosted an after-hours party in Tacoma.

Devennice Gaines went with two friends, Lakhea Thomas and Denise Green, to an after-hours party at the Global Grinders motorcycle club in Tacoma. RP (3/27/14) 653-655; RP (3/31/14) 930-931. Mr. Gaines was not a member of the club. RP (4/8/14) 1444. He was not from the area. RP (3/27/14) 645, 654. He did not know that the clubhouse had once been closed down because of a shooting. RP (3/17/14) 9.

Once he got to the club's headquarters, he was "wanded" with a metal detector, which found no weapons. RP (3/27/14) 663, 777; RP (3/31/14) 939. Security also patted him down and found nothing. RP (3/27/14) 777; RP (3/31/14) 939. They wanded and patted down all non-club-members. RP (3/24/14) 472-473; RP (3/27/14) 665; RP (3/31/14) 895; RP (3/31/14) 938-939, 1066.

Thomas and Green were also wanded and patted down, but security did not check inside Green's purse. RP (3/27/14) 663, 774; RP (3/31/14) 938-939, 996, 996, 1015.

The members of Global Grinders were not checked for weapons. RP (4/8/14) 1433, 1489. Neither were people wearing vests showing membership in other motorcycle clubs. RP (4/8/14) 1489. Several club

members carried guns inside the party. RP (3/27/14) 675-676, 682; RP (3/31/14) 950-951.

Inside the club, a man in a wheelchair – Dashe Tate – started harassing Thomas and Green. RP (3/31/14) 941-942. Tate ran over Thomas's feet with his chair. RP (3/31/14) 942. Green and Thomas thought it might have been because they were not from the area. RP (3/31/14) 942.

Later, Mr. Gaines had an altercation with Tate as well. RP (3/24/14) 413-414; RP (3/27/14) 670; RP (3/31/14) 946-947. It is not clear whether Tate lunged at Mr. Gaines or whether Mr. Gaines grabbed at him, but Tate ended up out of his chair and on the floor. RP (3/27/14) 670; RP (3/31/14) 946-937.

Immediately, several motorcycle club members swarmed Mr. Gaines. RP (3/27/14) 672-675; RP (3/31/14) 948-949. They dragged him away from the dance floor in a chokehold. RP (3/31/14) 950, 997-998. They held him up against a wall. RP (3/24/14) 417-420, 478-479; RP (3/27/14) 676; RP (3/31/14) 950-951. They closed all the doors and would not let anyone leave. RP (3/24/14) 478; RP (3/27/14) 679; RP (4/8/14) 1438.

The motorcycle club president – Victor McVea – acted like he was going to "rough" Mr. Gaines up. RP (3/24/14) 479; RP (3/27/14) 676-678;

RP (3/31/14) 999. McVea and at least one other club member had guns drawn.[1] RP (3/27/14) 675-677, 682, 784-785; RP (3/31/14) 951. McVea was so angry that other club members had to pull him off Mr. Gaines. RP (4/8/14) 1486.

Mr. Gaines did not fight back. RP (3/27/14) 674; RP (4/8/14) 1437. He just shook his head and said, "don't do me like that." RP (3/27/14) 674.

Thomas was scared. RP (3/27/14) 785. She approached an older club member and pled with him to just let her, Green, and Mr. Gaines leave. Eventually, the club member agreed. RP (3/27/14) 685.

By then, the lights had come up and the party was over. RP (3/24/14) 484; RP (3/27/14) 673; RP (3/31/14) 953; RP (4/1/14) 1101. Almost everyone from inside, including Mr. Gaines, Thomas, and Green, went out into the adjacent alley to their cars. RP (3/24/14) 421.

2. Someone shot Bruce Price, shortly after Denise Green told him to back up while holding her hand in her purse as though she had a gun.

It was very dark in the alley. RP (3/24/14) 429; RP (4/8/14) 1499-1500. A man named Bruce Price confronted Mr. Gaines about fighting

[1] Some Global Grinders members testified that no one had guns drawn. *See e.g.* RP (4/1/14) 1104-1105; RP (4/8/14) 1433, 1560. McVea, a convicted felon, claimed that he didn't touch a gun that evening. RP (4/8/14) 1433.

with a man in a wheelchair. RP (3/24/14) 430; RP (3/27/14) 692-693. Price told Mr. Gaines that he was "fucked up." RP (3/27/14) 693.

Mr. Gaines did not engage with Price. RP (3/24/14) 485; RP (3/27/14) 692, 789-790. Instead, he walked toward the car he had come in. RP (3/24/14) 485-486; RP (3/27/14) 694, 789-790.

Green, however, walked toward the fracas. RP (3/27/14) 694, 699. She told Price's friend, Jesse Williams, not to "jump in." RP (3/24/14) 431. She told Price and Williams to back up. RP (3/27/14) 695; RP (3/31/14) 1007, 1078.

Both Thomas and Mr. Gaines implored Green to just get in the car, but she didn't listen.[2] RP (3/27/14) 694, 697, 793; RP (3/31/14) 1007, 1080-1081. She put her hand in her purse and waved it at Williams as though she had a gun. RP (3/24/14) 433; RP (3/27/14) 694, 792-793. She was acting like there was going to be a fight. RP (3/24/14) 432. Williams felt threatened enough that he considered hitting Green to knock her over a car. RP (3/24/14) 489.

Williams continued walking down the alley, with Price immediately in front of him, and Mr. Gaines and Thomas a few feet in

[2] At one point, Mr. Gaines told Green to "get in the car, bitch." RP (3/31/14) 1025.

front of Price.[3] RP (3/24/14) 434. There were a lot of other people in the alley too. RP (4/8/14) 1451.

Then, several gunshots were fired. RP (3/24/14) 433. The only argument going on immediately beforehand was between Green and Williams. RP (3/27/14) 699-700; RP (3/31/14) 1004, 1015, 1030-1031; RP (4/1/14) 1081.

When the shots fired, Mr. Gaines, Green, and Thomas all ran to their car. RP (3/24/14) 435; RP (3/27/14) 698. Because they ran, Williams assumed that the shots had come from one of them. RP (3/24/14) 435. Otherwise, he could not tell where the shots came from. Nor could he tell how far away the shooter was. RP (3/24/14) 436, 519. He initially believed that someone had fired up into the air, as a warning shot. RP (3/24/14) 436.

3. Bullets from two different guns hit Price, and witnesses fled before the police arrived.

There were at least two guns fired. RP (3/27/14) 702. Price was hit with multiple bullets – at least one .38 and one 9 mm. Ex. 11, 12; RP (4/1/14) 1135, 1173, 1175, 1178; RP (4/8/14) 1309-1321. He died shortly thereafter. RP (3/19/14) 41.

[3] Thomas testified that Mr. Gaines was facing Price as he walked. RP (3/27/14) 692. Williams said that he did not see Mr. Gaines walking backwards. RP (3/24/14) 553.

Almost everyone in the alley fled before the police arrived. RP (3/19/14); 57; RP (3/24/14) 448, 537; RP (4/1/14) 1110-1111, 1242; RP (4/8/14) 1460; RP (4/8/14) 1566. This included McVea, the club president.[4] RP (4/18/14) 1459-1460. Mr. Gaines, Green, and Thomas all got into Thomas's car and left at the same time as everyone else. RP (3/24/14) 537; RP (3/27/14), 703, 707.

When the police got there a few minutes later, they found only Williams, Price, and a few people who were trying to help. RP (3/24/14) 448-449.

A neighbor came out and watched the scene after hearing the gunfire. RP (4/1/14) 1237-1238. He told the police that he saw someone hand a package off to a person in an SUV. RP (4/1/14) 1241. He thought the package may have contained a gun. The handoff interaction was not connected to Mr. Gaines.[5] RP (4/1/14) 1241-1245.

4. Williams and McVea both assumed that Mr. Gaines had shot Price, because Price was addressing Mr. Gaines at the time of the shooting.

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[4] McVea ordered another member to lock the club headquarters before leaving. RP (4/8/14) 1459-1460.

[5] The neighbor testified that the handoff was disconnected from a silver BMW "flying down 23rd," in the direction that Mr. Gaines's car went. RP (4/1/14) 1244-1245. Other witnesses testified that Mr. Gaines left in a silver Mercedes. RP (3/24/14) 446.

Williams admitted that he had not actually seen Mr. Gaines with a gun. RP (3/20/14) 296; RP (3/24/14) 466. Nor did he see any flashes coming from Mr. Gaines's direction when the shots were fired. RP (3/24/14) 435. In spite of this, he told the police that Mr. Gaines was the shooter. RP (3/20/14) 270. He believed that the shots came from Thomas, Green, or Mr. Gaines because the three of them ran after the shooting. RP (3/24/14) 435.

He described the car in which Mr. Gaines left. RP (3/20/14) 269.

McVea also identified Mr. Gaines as the shooter. RP (4/8/14) 1475. He later admitted, though, that he had not seen the actual shooting. RP (4/8/14) 1484. He had just assumed it was Mr. Gaines because Mr. Gaines had fought with Tate and been thrown out of the club.[6] RP (4/8/14) 1506, 1512.

The medical examiner was unable to determine the direction from which Price had been shot. RP (4/2/14) 1316.

No other witnesses claimed to have seen the shooting. Several witnesses had seen the confrontation between Tate and Mr. Gaines. *See e.g.* RP (3/31/14) 896-897, 900; RP (4/1/14) 1101, 1107-1108.

[6] At trial, McVea testified that he saw "muzzle flashes" coming from near where Mr. Gaines had been. RP (4/8/14) 1451.

The police found numerous .38 and 9 mm shell casings in the alley. RP (4/1/14) 1124-1132, 1165-1167; Ex. 6, 7, 9. No guns were ever recovered. *See* RP *generally*.

5. Green and Thomas decided to put the shooting on Mr. Gaines, and both lied to police.

Green and Thomas both lied during their initial interviews with police. RP (3/27/14) 718, 720-721, 741, 804; RP (3/31/14) 981-982, 985. After Thomas spoke with police, she told Green what she had said so they could coordinate their stories. RP (3/27/14) 721-722, 739-740, 804; RP (3/31/14) 981-982.

Thomas and Green decided to put the shooting on Mr. Gaines. RP (3/27/14) 742, 804. They thought that his "life was over" anyway because they believed he was going to face unrelated federal charges. RP (3/27/14) 725. They distanced themselves from him and said that they had not gone to the party together. RP (3/17/14) 718, 720-721, 741-742, 803; RP (3/31/14) 985.

The state charged Mr. Gaines and Thomas with Price's murder. CP 1-2. Green pled guilty to rendering criminal assistance. RP (10/7/13) 374. The state also charged Mr. Gaines with unlawful possession of a firearm. CP 1-2.

6. Mr. Gaines' first trial ended in a mistrial after the prosecutor dismissed murder charges against Thomas following a closed-door meeting with her.

Mr. Gaines and Thomas completed jury selection in a joint trial. RP (9/16/13) 108. After the jury was sworn in, the prosecutor decided to dismiss Thomas's murder charge with prejudice and proceed only against Mr. Gaines. RP (9/9/13) 35; RP (9/12/13) 81.

The prosecutor made this decision after meeting with Thomas when a "new" report surfaced, memorializing a much earlier police interview with her.[7] The prosecutor admitted, though, that the report did not add any new or relevant facts to the case. RP (9/12/13) 94. In resisting Mr. Gaines's mistrial motion, the prosecutor claimed that there was not actually any new evidence in the case. RP (9/16/13) 111-112. He said that Thomas's new statement merely confirmed what other witnesses had already said. RP (9/12/13) 94.

The prosecutor told the judge that he did not believe he had enough evidence to proceed against Thomas. RP (9/12/13) 83. He also said that

[7] The lead detective on the case had failed until that point to write a report memorializing a much earlier interview with Thomas. RP (9/16/13) 104. The missing report came to light only after the trial had begun. RP (9/16/13) 104. Once the report surfaced, Thomas agreed to give a new "proffer" statement to the prosecutor. RP (9/12/13) 87. The prosecutors held a closed-door meeting with Thomas and conducted an interview. RP (9/12/13) 83-84. Thomas also drew a diagram of the scene in the alley at the time of the shooting. RP (3/27/14) 743; Ex. 76. The next day, the prosecutor moved to dismiss Thomas's murder charge. RP (9/12/13) 81.

the decision was made because of Thomas's "willingness to talk." RP (9/12/13) 83.

Mr. Gaines moved to dismiss the charge against him under CrR 8.3 based on governmental mismanagement of the case. RP (9/16/13) 101-102. He said that the prosecutor's last minute decision to dismiss charges against Thomas and to introduce new evidence (in the form of her testimony) forced him to choose between his rights to adequately-prepared counsel and to a speedy trial. RP (9/16/13) 108.

He pointed out that the jury had seen Thomas sitting next to Mr. Gaines for five days of jury selection and that he could not predict how that would color their view of her testimony. RP (9/12/13) 87-89. He said he needed to do additional investigation into the case given Thomas's new role. RP (9/12/13) 89; RP (9/16/13) 105.

Mr. Gaines also argued that he had not been able to *voir dire* potential jurors about the effect that Thomas's testimony would have on them. RP (9/12/13) 88. He noted that he had had to share his peremptory challenges with Thomas's counsel, which resulted in two jurors on the panel whom he would have dismissed if acting alone. RP (9/12/13) 88-89.

The court found that the lead detective had engaged in mismanagement by failing to write a report about her interview with Thomas until after trial had begun. RP (9/16/13) 120-121. Even so, the

court denied Mr. Gaines's motion to dismiss. RP (9/16/13) 122. The court did not make any findings regarding the prosecutor's actions.

Mr. Gaines moved for a mistrial, which the court granted. RP (9/16/13) 123, 127.

7. The second trial ended in a mistrial when the jury could not reach a unanimous verdict.

The case proceeded to a second trial with Mr. Gaines as the only defendant. *See* RP (9/30/13) – RP (10/30/13). After fourteen days of testimony, the second trial resulted in a hung jury. RP (10/30/13) 2704-2717. With Mr. Gaines's consent, the court declared a mistrial. RP (10/30/13) 2715-2716, 2720.

8. At the third trial, the court barred inquiry into the connection between Thomas's decision to cooperate and the dismissal of the murder charge against her.[8]

At trial, Mr. Gaines sought to cross-examine Thomas regarding the dismissal of her murder charge. RP (10/9/13); 715-727, 766-770; RP (10/10/13) 878-898. He sought to show that she gave her most recent statement to the prosecution while the murder charge was still hanging over her head. RP (10/9/13) 718-720. He argued that the evidence was relevant to bias and credibility. RP (10/9/13) 719-720.

[8] Some of the evidentiary rulings discussed in this section were made during Mr. Gaines's second trial. The parties agreed, however, that those rulings would carry over to the third trial under the law of the case doctrine. RP (3/17/14) 23; RP (3/24/14) 510.

The court denied Mr. Gaines's motion. RP (10/9/13) 726. The court only let Mr. Gaines bring out that Thomas was once charged with Price's murder and that the charge was dismissed. RP (10/10/13) 893; RP (3/27/14) 805. The judge did not allow Mr. Gaines to draw any connection between her statement and the dismissal. RP (10/10/13) 896-898.

9. The court barred Mr. Gaines from asking Victor McVea, who was likely the second shooter, about the reasons he might have lied to the jury by claiming to be unarmed.

Both Thomas and Green testified that McVea drew a gun while he was confronting Mr. Gaines about the fight inside the club. RP (3/27/14) 675-677, 682, 784-785; RP (3/31/14) 951. Williams testified that within 30 seconds of the initial shots, a man affiliated with "the motorcycle thing" came and knelt nearby, shooting down the alley toward Thomas, Green, and Mr. Gaines. RP (3/24/14) 441-445.

McVea denied having a gun with him. RP (4/8/14) 1433.

On cross-examination, Mr. Gaines sought to elicit that McVea had prior felony convictions, which made it a crime for him to possess a gun. RP (10/15/13) 1466-1772. He argued that the evidence was admissible to demonstrate McVea's motivation to lie about being armed that night. RP (10/15/13) 1466.

The court prohibited Mr. Gaines from asking McVea about his prior convictions because they were not admissible under ER 609. RP (10/15/13) 1472.

10. The court excluded evidence that Denise Green carried a gun most of the time, which Mr. Gaines offered in support of his "other suspect" theory.

Thomas and Green had known each other their whole lives. RP (10/10/13) 694. They were best friends and spent time together several days a week, including sleeping at one another's houses. RP (10/10/13) 694; RP (3/27/14) 750. Thomas knew Green to carry a "girl gun" most of the time. RP (10/10/13) 694-695; RP (3/27/14) 799. Initially, the state did not object to the defense plan to introduce that evidence. RP (10/10/13) 696.

Later, however, the state changed its position. RP (10/10/13) 899. Mr. Gaines argued that the evidence of Green's habit for gun-carrying was relevant to his theory that she was the actual shooter in the alley. RP (10/10/13) 901. The court granted the state's motion to exclude the evidence, ruling that it was inadmissible propensity evidence. RP (10/10/13) 902.

In closing, Mr. Gaines argued that the forensic evidence showed that the bullets that hit Price actually came from Green's direction. RP

(4/9/14) 1666. He recounted the lead detective's testimony that she "did not pay much attention to bullet trajectory in the case. RP (4/9/14) 1665.

Counsel also noted that Mr. Gaines had been standing very close to Price, and that forensic evidence would have allowed police to determine if the shooter had been within 6 feet of Price. Law enforcement had not performed such forensic testing. RP (4/9/14) 1652-1653.

11. In closing, the prosecutor attributed certain statements to Mr. Gaines, even though no one testified he had made those statements.

The state wanted to have Green testify to her prior statement that someone in the alley had said "it's about to go down" just before the shooting. RP (3/31/14) 1026. She said she did not remember that statement. RP (3/31/14) 1026. She agreed that she had told police Thomas's boyfriend, Damico, had said "it's about to go down". RP (3/31/14) 1027.

In closing argument, however, the prosecutor attributed the "it's about to go down" statement to Mr. Gaines. RP (4/9/14) 1642. He claimed that Mr. Gaines had said: "Get to the car, it's about to go down. Get the car started, I got this, I'll be there in a second" immediately before the shooting. RP (4/9/14) 1642.

The prosecutor projected the words "it's about to go down" for the jury to read. CP 378. He argued that Mr. Gaines said those words as a warning to Green that he was about to shoot Price. RP (4/9/14) 1642.

12. During deliberations, one juror told the others that Mr. Gaines had two prior strikes, referring to a newspaper article that had made that inaccurate claim.

Long before the third trial, the Tacoma Tribune published a story about the case. RP (4/10/14) 1713. The article said that Mr. Gaines had a prior conviction for manslaughter and was registered as a sex offender. RP (4/10/14) 1715. The article said that Mr. Gaines was in a gang in Seattle. RP (4/10/14) 1715. It also claimed that a conviction for Price's murder would be Mr. Gaines's "third strike."[9] RP (4/10/14) 1714.

During deliberations, Juror 2 told the other jurors about the article. CP 411. He alluded to the information while arguing that Mr. Gaines did not have any reason to shoot Price: "Why would he do it? He has two strikes against him already. I don't see why he would do it." RP (4/10/14) 1718.

All of the other jurors heard that this would have been Mr. Gaines's third strike. RP (4/10/14, 2) 1718-1726, 1734-1771. At least one

[9] Mr. Gaines was not really a third strike candidate. Apparently there was some confusion regarding his status, however, at the beginning of the case. RP (4/10/14) 1714.

juror also heard that he may have had a prior conviction for manslaughter. RP (4/10/14) 1735.

The court questioned all of the jurors except Juror 2. RP (4/10/14) 1718-1726, 1734-1771. All eleven of the jurors questioned said they could still be fair, and they would follow any instruction to decide the case based only on the evidence in court. RP (4/10/14) 1718-1726, 1734-1771.

13. Mr. Gaines was convicted after the court refused to declare a mistrial, gave no curative instruction regarding the extrinsic information, and excused the only juror known to favor acquittal.

The court dismissed Juror 2 without questioning him. The court found that Juror 2 had failed to disclose that he had read the Tacoma Tribune article and that he'd introduced extrinsic information into deliberations. RP (4/10/14) 1778-1780. The court never asked Juror 2 if he would be able to disregard the information or if he could still be fair. RP (4/10/14) 1718-1726, 1734-1771. Juror 2 was the only juror whose tentative position on the merits of the case was indirectly exposed to the court. RP (4/10/14) 1710-1787.

Mr. Gaines moved for a mistrial. RP (4/10/14) 1712. He argued that the information about Mr. Gaines's criminal history was a bell that could not be un-rung. RP (4/10/14) 1714, 1773. He said it was an "atomic

bomb" because the three strikes law is reserved for the "worst of the worst" and made Mr. Gaines appear very violent. RP (4/10/14) 1772.

The court reserved ruling on the mistrial motion, brought in an alternate juror, and told the jury to start deliberations anew. RP (4/10/14) 1783-1786.

The court never gave a curative instruction relating to the extrinsic information. RP (4/10/14) 1710-1787. The judge never told the jury that the allegation about Mr. Gaines's three-strike status was untrue.[10] Nor did the court instruct jurors to disregard the information, to refrain from mentioning it to the alternate juror. Jurors were never told that they could not consider it for any purpose. RP (4/10/14) 1710-1787.

Mr. Gaines renewed his motion for a mistrial before the verdict was read. RP (4/14/14) 5-6. Counsel pointed out that jurors would naturally claim they could be impartial despite the inaccurate information imparted by Juror 2: to do otherwise might render useless all the time they'd spent listening to the evidence. RP (4/14/14) 1773. The court denied the motion. RP (4/14/14) 9.

The judge acknowledged that the extrinsic information was significant but pointed out that the jury had already read a stipulation that

[10] The judge's questions to some of the jurors implied that it might be true. RP (4/10/14) 1741-1771.

Mr. Gaines had one (un-named) felony conviction. RP (4/14/14) 8. The court said the jurors were adamant that they could still be fair and impartial. RP (4/14/14) 8. The court pointed out that judges are routinely expected to disregard extrinsic information in bench trials and said that juries should not be treated any differently. RP (6/5/14) 1799. The judge also said that it would not be efficient to grant a mistrial at such a late stage. RP (4/14/14) 9.

The jury convicted Mr. Gaines of second-degree murder and unlawful possession of a firearm. RP (4/14/14) 10-11.

Mr. Gaines was found indigent at the end of the trial. [11] CP 500-02. There was no discussion of his financial situation at sentencing. RP (6/5/14) 1810-1817. Still, the Judgment and Sentence form included a boilerplate finding that Mr. Gaines had the ability to pay legal financial obligations (LFOs). CP 487. The court ordered him to pay $1,900 in LFOs. CP 488.

This timely appeal follows. CP 499.

[11] He had also been found indigent and appointed counsel at the start of the case. Notice of Appearance (4/26/12), Supp CP.

ARGUMENT

I. THE COURT VIOLATED MR. GAINES'S JURY TRIAL RIGHT BY DENYING HIS MOTION FOR A MISTRIAL AND BY REMOVING THE ONLY JUROR KNOWN TO FAVOR ACQUITTAL.

A. The court should have granted a mistrial because jurors heard highly prejudicial extrinsic information during their deliberations.

During deliberations, Juror 2 announced—incorrectly—that Mr. Gaines had two prior strikes.[12] RP (4/10/14) 1718. All the other jurors heard this, either from him or during the ensuing discussion. RP (4/10/14) 1718-1726, 1734-1771. At least one other juror also heard that Mr. Gaines had a prior manslaughter conviction. RP (4/10/14) 1735. The judge's questions to some jurors implied—again, incorrectly—that Mr. Gaines did indeed have two prior strikes. RP (4/10/14) 1741-1771.

Despite the jury's exposure to highly prejudicial and misleading extrinsic information, the court denied a mistrial motion.[13] RP (4/14/14) 9. The judge never gave a curative instruction, never told the jury that Mr. Gaines did *not* already have two strikes, and never admonished jurors they could not consider the unadmitted information for any purpose. RP (4/10/14) 1710-1787.

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[12] Before the trial, the Tacoma Tribune mistakenly reported that a conviction in this case would be Mr. Gaines's third strike. RP (4/10/14) 1713. The article also mentioned his juvenile manslaughter adjudication. RP (4/10/14) 1715.

[13] In his motion, Mr. Gaines argued that the extrinsic information was an "atomic bomb" that would prejudice the jury. RP (4/10/14) 1712, 1772.

The court denied the mistrial motion based on the jurors' assurances that they would be able to follow an instruction to disregard the information, but then did not give them such an instruction. RP (4/14/14). The judge opined that jurors could disregard such information just as easily as judges routinely do in bench trials. RP (6/5/14) 1799. The judge also said that having another trial would not be an efficient use of judicial resources. RP (4/14/14) 8-9.

Due process and the right to a jury trial guarantee accused persons a fair trial by an impartial jury. *State v. Berniard*, 182 Wn. App. 106, 117, 327 P.3d 1290 (2014); U.S. Const. Amends. VI, XIV; art. I, §§ 21, 22. A mistrial was necessary in this case to ensure that Mr. Gaines received a fair trial by an impartial jury.

The introduction of extrinsic evidence into jury deliberations entitles the accused to a new trial if there are reasonable grounds to believe that it was prejudicial. *State v. Johnson*, 137 Wn. App. 862, 869-70, 155 P.3d 183 (2007). Any doubt that the verdict was affected must be resolved in favor of a new trial. *Id.*

The inquiry is objective. *Id.* The court must look to whether the extra-evidentiary allegations could have affected the jury. *Id.* The court errs by looking subjectively to the actual effect. *Id.* A new trial must be granted unless the court can determine beyond a reasonable doubt that the

extrinsic evidence could not have impacted the verdict. *Id.; See also State v. Boling*, 131 Wn. App. 329, 332-33, 127 P.3d 740 (2006).

Here, the court failed to apply the required objective standard. RP (4/14/14) 8-9. Indeed, the court's reasoning was based almost exclusively on the extent to which the jurors were "adamant" that they could still be fair and impartial. (4/14/14) 8-9. But the jurors' subjective beliefs were inapposite to the analysis. *Johnson*, 137 Wn. App. at 871. After sitting through ten days of testimony, it is unlikely that any of them would have admitted that they were unable to proceed.

The court erred by failing to objectively consider the impact on the jury. Here, the extrinsic information about Mr. Gaines's alleged three strikes and prior manslaughter conviction was highly prejudicial. Under an objective standard, it could not have been harmless beyond a reasonable doubt. *Johnson*, 137 Wn. App. at 871. The trial court abused its discretion and applied the wrong legal standard. *Id.*

Extrinsic evidence regarding an accused person's prior convictions can be particularly damaging. *See e.g. Marshall v. United States*, 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250 (1959); *United States v. Keating*, 147 F.3d 895 (9th Cir. 1998); *Dickson v. Sullivan*, 849 F.2d 403 (9th Cir. 1988).

The state cannot establish beyond a reasonable doubt that the extrinsic information about two supposed prior strikes did not affect Mr. Gaines's trial. There was no direct evidence implicating Mr. Gaines. No one saw him with a gun. He was walking away from Price when Price was shot. RP (3/24/14) 485-486; RP (3/27/14) 694, 789-790. The state's theory was, basically, that Mr. Gaines must have been the shooter because it could not have been anyone else.

With such a dearth of reliable evidence, there is a reasonable probability that the jury improperly used Mr. Gaines's alleged history of serious, violent crime as a tiebreaker in finding him guilty.

Also, as noted by Mr. Gaines's defense attorney at the motion hearing, the three strikes law is reserved for "the worst of the worst." RP (4/10/14) 1772. The jury could reasonably have used the information to infer that Mr. Gaines was a violent person. Indeed, at least one juror also heard about his prior manslaughter conviction,[14] which created a direct propensity-based link to guilt in this murder case. There is a reasonable probability that the jury decided that Mr. Gaines was the most likely one to have committed the murder because he had a propensity for doing so.

The court violated Mr. Gaines's right to a fair trial and to an impartial jury by denying his motion for a mistrial after the entire jury was

[14] Mr. Gaines was convicted of manslaughter as a juvenile.

exposed to extremely prejudicial extrinsic information during deliberations. *Johnson*, 137 Wn. App. at 869-70. Mr. Gaines's conviction must be reversed. *Id.*

B. After deliberations commenced, the court should not have excused the only juror known to favor acquittal without questioning him about his ability to be fair to both sides.

When the court has information about a juror's substantive opinion on the merits of a case, the constitution[15] places a higher burden on the court before that juror may be dismissed. *State v. Depaz*, 165 Wn.2d 842, 857, 204 P.3d 217 (2009). This is true even if the juror has committed misconduct. *Id.*

The only juror the court did not question was Juror 2 – the man who read the news article and told the other jurors about Mr. Gaines's alleged third strike candidacy. RP (4/10/14) 1718-1726, 1734-1771. Juror 2 had used that information to argue that Mr. Gaines had no reason to shoot Price. RP (4/10/14) 1718.

The court determined that all eleven other jurors would be able to disregard the extrinsic information but never asked Juror 2 whether he would be able to do so. RP (4/10/14) 1718; RP (4/14/14) 8-9. Instead, the

[15] ; U.S. Const Amends. VI, XIV; art. I, §§ 21, 22.

court simply dismissed Juror 2 and replaced him with an alternate. RP (4/10/14) 1778-1780.

Because the court had information about Juror 2's position, it violated Mr. Gaines's right to an impartial jury by summarily dismissing him without at least inquiring into whether any prejudice could be cured. Indeed, the court found that eleven other jurors could be fair despite knowledge of the outside information. There was no indication that Juror 2 would be unable to do the same.

Here, the court knew that Juror 2 was arguing for acquittal when the extrinsic information about Mr. Gaines came to light. RP (4/10/14) 1718. The court violated Mr. Gaines's rights to due process to an impartial jury, and to a unanimous verdict by dismissing Juror 2 without inquiring into whether he was actually prejudiced. *Id.*

When the court knows which direction a juror is leaning, it may not dismiss that juror for misconduct without first inquiring into whether the juror has been prejudiced. *Id.* The prejudice inquiry looks to whether any misconduct has actually affected the juror's ability to deliberate. *Id.* If the juror can still deliberate fairly despite the misconduct, the juror may not be excused. *Id.*

When the court is aware of a juror's opinion of the case, the court abuses its discretion by dismissing that juror for misconduct without first

inquiring into whether the misconduct has caused prejudice that precludes the juror from deliberating fairly. *Depaz*, 165 Wn.2d at 859.

Here, the trial court had information regarding Juror 2's substantive opinion of the case against Mr. Gaines. RP (4/10/14) 1718. Juror 2 was arguing that Mr. Gaines had no reason to shoot Price when the extrinsic information came to light. RP (4/10/14) 1718. The court's knowledge that Juror 2 was leaning toward acquittal precluded his dismissal -- even though he committed misconduct by interjecting extrinsic evidence -- unless the court found that he was unable to deliberate fairly. *Depaz*, 165 Wn.2d at 857.

But the court failed to conduct the necessary inquiry to determine whether Juror 2 had been prejudiced. RP (4/10/14) 1718-1726, 1734-1771. Indeed, the court concluded that all the other jurors could be fair and impartial despite the extrinsic evidence. RP (4/14/14) 8-9. The court did not even ask Juror 2 whether he would be able to do the same. RP (4/10/14) 1718-1726, 1734-1771. The court abused its discretion by dismissing Juror 2 without first determining that prejudice prevented him from continuing deliberations fairly. *Depaz*, 165 Wn.2d at 859.

The rule set forth in *Depaz* protects the accused's right to a unanimous jury. It does this by assuring that the court's decision to remove the juror is not influenced by a desire for a particular outcome.

Depaz, 165 Wn.2d at 858 (*citing State v. Elmore,* 155 Wn.2d 758, 771, 123 P.3d 72 (2005)).

Misconduct, alone, is not enough: "the removal of a juror [whose views on the case are known] upon a showing of bare misconduct fails to demonstrate a purpose for the removal." *Id.* The requirement of an additional finding of prejudice "prevents a trial court from removing a holdout juror on a technical finding of misconduct without further determining the removal serves a purpose of avoiding prejudice to one of the parties." *Id.*

Here, the court removed Juror 2 based on a "showing of bare misconduct." *Id.* The court did not look into and accordingly did not determine that Juror 2 was unable to set the extrinsic information aside and deliberate fairly. RP (4/10/14) 1778-1780. The court violated Mr. Gaines's right to an impartial jury and to a unanimous verdict. *Depaz*, 165 Wn.2d at 858.

The denial of the right to an impartial and unanimous jury is "classic structural error." *Berniard*, 182 Wn. App. at 123-24 (*citing Chapman v. California*, 386 U.S. 18, 24 n. 8, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). The remedy for improper dismissal of a deliberating juror is reversal and remand for a new trial. *Id.* No additional showing of prejudice is required. *Id.*

The court violated Mr. Gaines's rights to a unanimous verdict and to an impartial jury by dismissing a juror who was leaning toward acquittal without a determination that he was unable to deliberate fairly. *Depaz*, 165 Wn.2d at 859. Mr. Gaines's convictions must be reversed. *Id.*

II. THE PROSECUTOR COMMITTED MISCONDUCT BY PUTTING WORDS IN MR. GAINES'S MOUTH THAT WERE NOT IN EVIDENCE AND THAT MADE IT APPEAR AS THOUGH HE'D PLANNED TO SHOOT PRICE.

Mr. Gaines was walking away from a fight when Price was shot. RP (3/24/14) 485-486; RP (3/27/14) 694, 789-790. He was not arguing with Price at the time and never threatened him. RP (3/24/14) 485; RP (3/27/14) 692, 789-790. The state offered no explanation for how Mr. Gaines could have accessed a gun after being checked with a metal detector and patted down upon entering the party.

Green, however, was arguing with people in the alley. She told Williams not to mess with her. RP (3/27/14) 695; RP (3/31/14) 1007, 1078. She regularly carries a small gun, and she had her hand in her purse and was waving it around in a threatening manner. RP (3/24/14) 433; RP (3/27/14) 694, 792-793. Indeed, Green's purse was not checked with the metal detector when she arrived at the club. RP (3/31/14) 996, 1015. Green was walking toward and stirring up the melee. RP (3/27/14) 694, 699.

At that point, Mr. Gaines told Green to "get in the car."[16] RP (3/31/14) 1007, 1080-1081. No one testified that he said anything else to her. *See* RP *generally.*

Still, in closing argument, the prosecutor said that Mr. Gaines also said "it's about to go down." RP (4/9/14) 1642. He claimed that Mr. Gaines had said: "Get to the car, it's about to go down. Get the car started, I got this, I'll be there in a second." RP (4/9/14) 1642.

The prosecutor displayed the words "it's about to go down" visually for the jury. CP 378. He argued that Mr. Gaines said those words as a warning to Green that he was about to shoot Price. RP (4/9/14) 1642. He implied the words were evidence that Mr. Gaines was planning to shoot Price as he walked down the alley. RP (4/9/14) 1642.

The prosecutor committed flagrant and ill-intentioned misconduct by "testifying" to "facts" not in evidence and putting words in Mr. Gaines's mouth in closing argument. Because the prosecutor's misstatements went directly to the primary factual issue at trial, there is a substantial likelihood that the misconduct affected the outcome of Mr. Gaines's case.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const.

[16] Mr. Gaines may have said "get in the car, bitch." RP (3/31/14) 1025.

Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A prosecutor commits misconduct by urging a jury to consider "facts" that have not been admitted into evidence. *Glasmann*, 175 Wn. 2d at 705. It is, likewise, misconduct for a prosecutor to fabricate statements and attribute them to the accused in closing argument. *State v. Pierce*, 169 Wn. App. 533, 554, 280 P.3d 1158 (2012).

Here, the prosecutor attributed a statement to Mr. Gaines that was not in evidence. No witness testified that Mr. Gaines said "it's about to go down," "I got this," or anything else along those lines.

The state asked Green about the statement and she said she did not remember Mr. Gaines saying it. RP (3/31/14) 1026. She agreed that she had told the police that a different person said "it's about to go down." RP

(3/31/14) 1027. She said she may have fabricated the statement. RP (3/31/14) 1029. The prosecutor committed misconduct by claiming that Mr. Gaines said "it's about to go down" right before the shooting when there was no evidence to that effect. *Glasmann*, 175 Wn. 2d at 705; *Pierce*, 169 Wn. App. at 554. The misconduct was especially egregious because the prosecutor made a visual display of the words.

A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711. Visual images, especially when displayed during argument, are also likely to sway a jury in ways that words, alone, cannot. *Id.* at 708.

Mr. Gaines's trial was long and confusing. Nearly all of the civilian witnesses were subject to extensive impeachment with prior and sometimes internally-inconsistent statements. The prosecutor asked Green whether Mr. Gaines said "it's about to go down" and pointed out that she had told the police that someone made that statement. RP (3/31/14) 1026-1027. But Green told the police that someone *other than Mr. Gaines* said it. RP (3/31/14) 1026-1027. Neither she nor any other witness testified that Mr. Gaines said anything except "bitch, get in the car" or just "get in the car." *See* RP *generally*.

Given the "fact-finding facilities presumably available" to the prosecutor's office and the convoluted nature of the evidence at trial, the jury likely took the prosecutor's statements at face value. *Glasmann*, 175 Wn.2d at 706. The alleged statement was also projected visually for the jury. CP 378. There is a reasonable probability the jury believed that Mr. Gaines had actually said: "… it's about to go down. Get the car started, I got this..." as the prosecutor claimed. RP (4/9/14) 1642.

There is also a reasonable probability that the prosecutor's improper argument affected the jury's verdict. *Glasmann*, 175 Wn.2d at 704. The evidence against Mr. Gaines was far from overwhelming. No one saw him with a gun. He would not have been able to get in to the party if he had had one. When multiple motorcycle club members threatened Mr. Gaines, all he did in response was try to leave the party. RP (3/27/14) 674; RP (4/8/14) 1437. He did not fight back. RP (3/27/14) 674; RP (4/8/14) 1437. When Price approached Mr. Gaines to start another argument, Mr. Gaines's reaction was again simply to walk away toward the car. RP (3/24/14) 485-486; RP (3/27/14) 694, 789-790.

Indeed, Mr. Gaines did not seem to have any beef with Price. They do not appear to have ever met before. Price was not one of the men who had threatened and possibly pointed a gun at Mr. Gaines inside the party.

Still, the prosecutor's "evidence" about Mr. Gaines saying he's "got this" and it being "about to go down" made it seem as though he was not actually calmly removing himself from the situation. Those extra-testimonial "statements" were the only "evidence" that Mr. Gaines had any plan to cause any violence. Mr. Gaines was prejudiced by the prosecutor's improper "testimony" to "facts" not in evidence. *Id.*

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Pierce*, 169 Wn. App. at 552. Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

Here, the prosecutor had access to long-standing case law prohibiting the injection of "facts" not in evidence into closing argument. *See e.g. Id.*; *Pierce*, 169 Wn. App. at 553. Once the jurors had been encouraged to doubt their memories of what the witnesses actually said of Mr. Gaines's statements in the alley, the bell of the additional "evidence" would also have been difficult to un-ring with a curative instruction. The prosecutor's misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by distorting the evidence in closing argument and putting words into Mr. Gaines's mouth that made him appear guilty. *Glasmann*, 175 Wn. 2d at705; *Pierce*, 169 Wn. App. at 553. Mr. Gaines's conviction must be reversed. *Id.*

III. THE COURT VIOLATED MR. GAINES'S CONFRONTATION RIGHT BY IMPROPERLY LIMITING HIS CROSS-EXAMINATION OF STATE WITNESSES ON THEIR BIASES AND MOTIVES TO LIE.

The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. *State v. Darden*, 145 Wn.2d 612, 620, 26 P.3d 308 (2002) (citing *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)); U.S. Const. Amend. VI; Wash. const. art. I, § 22.

The confrontation clause protects more than "mere physical confrontation." *Darden*, 145 Wn.2d at 620 (quoting *Davis*, 415 U.S. at 315). The bedrock of the confrontation right is the guarantee of an opportunity to conduct a "meaningful cross-examination of adverse witnesses" to test for memory, perception, and credibility. *Darden*, 145 Wn.2d at 620. Confrontation helps assure the accuracy of the fact-finding process. *Id.* (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). The right to confront adverse witnesses must be "zealously guarded." *Darden,* 145 Wn.2d at 620.

The *Darden* court set out a three-part test for when cross-examination may be limited. *Darden*, 145 Wn.2d at 612. First, cross-examination that is even minimally relevant must be permitted under most circumstances. Second, the state must demonstrate that the evidence is "so prejudicial as to disrupt the fairness of the fact-finding process." Finally, the state's interest in excluding the evidence must be balanced against the accused person's need for the information sought. *Id.*

Exposure of witness bias is "a core value of the Sixth Amendment." *United States v. Martin*, 618 F.3d 705, 727 (7th Cir. 2010), *as amended* (Sept. 1, 2010). A witness's bias or possible incentive to lie is a "quintessentially appropriate topic for cross-examination." *Id.*

When a trial court prohibits an accused person from eliciting evidence relevant to bias of the state's witnesses, prejudice is presumed. *State v. Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Reversal is required unless the state proves that no rational jury could have a reasonable doubt as to guilt even with the omitted evidence. *Id.*

A. The court should have allowed Mr. Gaines to show that Thomas made her statements to the prosecutor and agreed to cooperate at a time when she still had a murder charge hanging over her head.

Thomas was originally charged with Price's murder as Mr. Gaines's co-defendant. But the state dismissed the murder charge against

Thomas after she provided a statement to the prosecutor behind closed doors. RP (9/12/13) 81.

The prosecutor said that the dismissal was because of Thomas's statement, in conjunction with her "willingness to talk." RP (9/12/13) 83.

Thomas testified for the state at Mr. Gaines's trial. RP (3/27/14) 644-829. But the court refused to let Mr. Gaines cross-examine her about the dismissal of her murder charge the day after she had a closed-door meeting with the prosecution. RP (10/9/13) 726.

Mr. Gaines was not allowed to elicit that she was still under the shadow of the charge when she met with the prosecutor and provided the information necessary to persuade him to proceed against Mr. Gaines alone. RP (10/9/13) 718-720. He was not allowed to point out that her "willingness to talk" led to the dismissal of a murder charge against her. RP (10/9/13) 726. Instead, he was only permitted to bring out that Thomas had originally been charged and that the charge had been dropped. RP (10/9/13) 726.

The court violated Mr. Gaines's right to confront Thomas by limiting his cross-examination into her potential bias. This requires reversal and remand for a new trial.

Bias evidence is always relevant. *Spencer*, 111 Wn. App. at 408 (citing *Davis*, 415 U.S. at 316-18). An accused person must be allowed to

cross-examine a witness regarding any expectation that his/her testimony might affect the resolution of other charges. *Martin*, 618 F.3d at 727.

A witness with such expectations may have "a desire to curry favorable treatment." *Martin,* 618 F.3d at 727. The exposure of such a motivation for testifying "is a proper and important function of the constitutionally protected right of cross examination." *Davis*, 415 U.S. at 316-17.

This is particularly true when the timing, nature, and status of the witness's charges permit an inference by which the jury could conclude that the witness is biased. *Martin*, 618 F.3d at 730.

The absence of an explicit agreement "does not end the matter." *Martin,* 618 F.3d at 728. Indeed, the witness need not even be aware of her or his own bias; the exposure of a witness's unconscious bias is a proper object of cross-examination. *See, e.g., United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).

In *Davis*, the United States Supreme Court reversed a conviction because the trial court prohibited the accused from cross-examining a key state witness about his status as a juvenile probationer. *Davis*, 415 U.S. at 311-13. The accused in *Davis* also sought to introduce evidence of the juvenile's prior burglary adjudication to demonstrate that he may have

been concerned that he would be suspected of the burglary crime at issue if he did not testify favorably for the state. *Id.*

The inference of Thomas's bias was much stronger than that in *Davis*. Thomas was not on probation for some un-related prior offense. She was originally charged with the same murder for which Mr. Gaines was on trial. It was only after the jury was selected in her joint trial with Mr. Gaines that Thomas provided the state with whatever information caused the prosecutor to dismiss the charge against her. RP (9/12/13) 81. She was still under the shadow of the murder charge when she gave the new statement.

The sequence of events permits a direct inference that Thomas's charge was dismissed in exchange for incriminating testimony against Mr. Gaines. Or, at the very least, that she made statements against Mr. Gaines while under the pressure of a pending murder charge and thereby saved herself from conviction in the same case.

Mr. Gaines's cross-examination of Thomas regarding the mere fact that she had once been charged in the case did not make that inference of bias clear for the jury. *See e.g. Davis*, 415 U.S. at 318. The court violated Mr. Gaines's right to confront adverse witnesses by impermissibly prohibiting him from cross-examining Thomas about a major potential source of bias. *Id.*

The state cannot demonstrate beyond a reasonable doubt that any rational jury would have convicted Mr. Gaines even if they had known of Thomas's potential bias. *Spencer*, 111 Wn. App. at 408.

No witness saw Mr. Gaines with a gun or explained how he would have gotten one. He was walking away from the tussle when the shooting happened. He had not responded violently despite repeated confrontations and threats from numerous people in the club. The evidence against Mr. Gaines was far from overwhelming.

Thomas's testimony supported the state's trial theory. According to Thomas, Mr. Gaines stood in the spot where the prosecutor claimed the fatal shots originated. The state introduced the diagram Thomas had drawn during her closed-door session with the prosecutor, in which she illustrated the location of each person in the alley. RP (3/27/14) 743-48; Ex. 76. The state relied on that diagram in closing argument. RP (3/27/14) 1670.

There was good reason to question Thomas's testimony and her diagram. However, information was withheld from the jury, and they were not able to properly assess her credibility and her bias.

The court violated Mr. Gaines's right to confrontation by preventing him from cross-examining Thomas regarding a key source of

bias. *Davis*, 415 U.S. at 318. Mr. Gaines's convictions must be reversed. *Id.*

B. The court should have allowed Mr. Gaines to cross-examine McVea regarding his motive to lie about being armed.

Thomas and Green both testified that McVea had a gun. RP (3/27/14) 675-677, 682, 784-785; RP (3/31/14) 951. They said that he drew it and waved it in Mr. Gaines's face during the confrontation inside the club. RP (3/27/14) 675-677, 682, 784-785; RP (3/31/14) 951. Someone affiliated with the motorcycle club knelt in the alley, firing a handgun. RP (3/24/14) 441-445. Although McVea claimed that none of the Global Grinders carried guns at the party, other witnesses testified that many of the Global Grinders were armed. RP (3/27/14) 675-676, 682; RP (3/31/14) 950-951; RP (4/8/14) 1433.

Mr. Gaines sought to cross-examine McVea about his prior felony convictions. RP (10/15/13) 1466-1772; RP (10/15/13) 1315-1316. Because McVea was legally prohibited from possessing guns, Mr. Gaines sought to introduce the evidence to explain that he had reason to lie about being armed. RP (10/15/13) 1466-1772; RP (10/15/13) 1315-1316.

The court violated Mr. Gaines's right to confront McVea by prohibiting him from exposing that critical bias evidence on cross-examination.

As discussed above, a witness's incentive to lie is a key area of cross-examination protected by the confrontation clause. *Martin*, 618 F.3d at 727. The evidence of McVea's motivation to lie about having a gun is also admissible under the three-part test set out in *Darden*. *Darden*, 145 Wn.2d at 612.

First, the evidence was highly relevant. McVea had acted so aggressively toward Mr. Gaines inside the club that other members had to pull him away. RP (4/8/14) 1486. Mr. Gaines was just past Price in the alley when the first shots were fired. RP (3/24/14) 434. McVea fit the description of a man who Williams had seen shooting down the alley in their direction. RP (3/24/14) 529-530; RP (4/8/14) 1507. Price was hit with bullets from at least two guns, one .38 and one 9 mm. Ex 11, 12; RP (4/1/14) 1135, 1173, 1175, 1178. The evidence supported an inference that McVea shot Price accidentally while firing at Mr. Gaines.

Mr. Gaines should have been able to explore reasons why McVea would be unwilling to admit he was the second shooter. McVea's prior felony convictions exposed him to criminal liability for possessing a gun. He had reason to lie.

Second, the state cannot demonstrate that the evidence would have been "so prejudicial as to disrupt the fairness of the fact-finding process." *Id.* Indeed, the state's only argument against the evidence was that the

convictions were more than ten years old so they were not admissible under ER 609.

But ER 609 addresses the use of prior convictions for crimes of dishonesty as general impeachment evidence. ER 609. Mr. Gaines did not offer McVea's prior convictions for that purpose. Rather, he wished to demonstrate why McVea may have been lying specifically about whether he was armed. RP (10/15/13) 1466-1772; RP (10/15/13) 1315-1316. His reason to lie on that point would also have led him to deny kneeling in the alley and shooting (as observed by Williams), and may have caused him to mislead the jury about his vantage point.

Finally, the state's interest in excluding the evidence must be balanced against the accused person's need for the information sought. *Id.* Unlike in *Darden*, where the state had an interest in keeping a police surveillance post secret, the state had no legitimate interest in excluding the evidence at issue here. The evidence was not unfairly prejudicial to the state. The court erred by limiting Mr. Gaines's cross-examination of McVea.

The state cannot demonstrate beyond a reasonable doubt that the improper limitations on Mr. Gaines's cross-examination had no affect on the outcome of his trial. *Spencer*, 111 Wn. App. at 408.

At least two witnesses said that McVea had a gun and was using it in a threatening manner shortly before the shooting. RP (3/27/14) 675-677, 682, 784-785; RP (3/31/14) 951. In fact, other members of the Global Grinders had to pull McVea off of Mr. Gaines and tell him to let Mr. Gaines leave. RP (4/8/14) 1486. The witnesses who said McVea was not armed were either members of or associated with the Global Grinders. RP (4/1/14) 1104-1105; RP (4/8/14) 1433, 1560.

If the jury had known that McVea was legally prohibited from carrying a gun, they may have given more weight to evidence that he was armed. Once the jury determined that McVea was armed, they could reasonably have concluded that he was one of the shooters, and that he shot Price while trying to hit Mr. Gaines. RP (3/24/14) 434. The jury might also have given less weight to McVea's statements about where he was when the shooting started.

The court violated Mr. Gaines's right to confront adverse witnesses by impermissibly limiting his cross examination of McVea on a critical issue. *Davis*, 415 U.S. at 318; *Darden*, 145 Wn.2d at 612. Mr. Gaines's convictions must be reversed. *Id.*

IV. THE COURT VIOLATED MR. GAINES'S RIGHT TO PRESENT A DEFENSE BY PROHIBITING HIM FROM INTRODUCING GREEN'S HABIT OF CARRYING A SMALL GUN IN HER PURSE.

Green was in the same area of the alley as Mr. Gaines when the shooting occurred. RP (3/24/14) 434. She held one hand in her purse and waved it around as though she had a gun, threatening Williams. RP (3/24/14) 432-433; RP (3/27/14) 694, 792-793. She had walked toward and stirred up the kerfuffle in the alley, apparently looking for a fight. RP (3/27/14) 694, 699.

Mr. Gaines's primary theory of defense was that Green had shot Price. RP (4/9/14) 1668-1670. To support that theory, he sought to introduce evidence that Green regularly carried a small gun. RP (10/10/13) 694-695; RP (3/27/14) 799. But the court precluded him from offering that evidence. RP (10/10/13) 902.

Due process guarantees the right to present a defense. U.S. Const. Amend. XIV; art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).[17] Here, the court violated Mr. Gaines's right to present a defense by prohibiting him from producing evidence that Green regularly carried a small gun with her. The evidence was admissible habit evidence under ER 406 and necessary to fully present Mr. Gaines's theory that Green had been the shooter in the alley.

[17] The compulsory process clause also contributes to the right. *Id.;* U.S. Const. Amend. VI.

The right to present a defense includes the right to introduce relevant[18] and admissible evidence. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007).

"Other suspect evidence" is admissible if it "tend[s] to connect" someone other than the accused to the crime. *State v. Franklin*, 180 Wn.2d 371, 381, 325 P.3d 159 (2014); *see also Holmes,* 547 U.S. 319. The evidence need not be sufficient to prove the other suspect's guilt beyond a reasonable doubt. *Franklin*, 180 Wn.2d at 381. Rather, it must merely tend to create a reasonable doubt as to the guilt of the accused. *Id.*

Here, there was sufficient nexus between Green and the shooting to introduce other suspect evidence. [19] *Id.* Green was standing in a position from which the bullets could have been fired. RP (3/27/14) 745; RP (4/2/14) 1311-1315. Numerous people in the alley believed she was carrying a gun. RP (3/24/14) 432-433; RP (3/27/14) 694, 792-793. She was behaving aggressively toward Williams immediately before the shooting. RP (3/24/14) 48; RP (3/27/14) 695; RP (3/31/14) 1007, 1078.

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[18] Evidence is relevant if it has any tendency to prove a material fact. ER 401. The threshold to admit relevant evidence is low; even minimally relevant evidence is admissible. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 669, 230 P.3d 583 (2010).

[19] The state originally moved *in limine* to exclude all other suspect evidence but withdrew the motion when Mr. Gaines said he intended to argue that Green was the actual shooter. RP (9/30/13) 161.

The evidence against Green was sufficient to raise a reasonable doubt as to Mr. Gaines's guilt. *Id.*

Evidence of a person's habit or routine is admissible to prove that his/her conduct conformed with that habit on a particular occasion. ER 406. Habit evidence is admissible whenever offered to prove a "fact of consequence" at trial. *State v. Prestegard*, 108 Wn. App. 14, 19, 28 P.3d 817 (2001). Such evidence can be excluded only if the court determines the conduct does not reach the level of habit or routine. *Torgerson v. State Farm Mut. Auto. Ins. Co.*, 91 Wn. App. 952, 962, 957 P.2d 1283 (1998).

Thomas and Green were best friends who spent time together several days a week. RP (10/9/13) 694. They had known each other their whole lives. RP (10/9/13) 694. Thomas knew Green to carry a small "girl gun" most of the time. RP (10/9/13) 694-695. Initially, the state did not plan to object to that evidence. RP (10/9/13) 696. Later, however, the state changed its position. RP (10/9/13) 899. The court granted the state's motion to exclude the evidence, ruling that it was inadmissible propensity evidence. RP (10/10/13) 902.

But ER 406 permits a propensity-like inference once a habit has been established. ER 406. Here, Thomas's testimony that she knew her best friend to carry a gun most of the time was sufficient to establish that it was Green's habit to do so. The issue of whether Green had a gun was a

"fact of consequence" at Mr. Gaines's trial. *Prestegard*, 108 Wn. App. at 19. The evidence was admissible. *Id.*; ER 406.

Where evidence is highly probative, no government interest can be compelling enough to preclude its introduction. *State v. Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Any evidence supporting an accused person's theory of the case is highly probative. *Id.*

Here, whether Green had a gun with her in the alley was a key issue in Mr. Gaines's case. Evidence that she regularly carried a gun was highly probative evidence suggesting that she had one on that night. The evidence was critical to Mr. Gaines's theory that Green was the real shooter. The court's exclusion of the evidence violated Mr. Gaines's right to present a defense. *Lord*, 161 Wn.2d at 301.

Denial of this right requires reversal unless the state shows beyond a reasonable doubt that the error did not affect the verdict. *State v. Elliott*, 121 Wn. App. 404, 410, 88 P.3d 435 (2004); *State v. Fisher*, 165 Wn.2d 727, 755, 202 P.3d 937 (2009). The state cannot make that showing here, because the excluded evidence was important to the defense theory.

The state's theory was that the bullets that hit Price came from the area of the alley where only Green, Thomas, and Mr. Gaines were located. Accordingly, every piece of evidence tending to show that either Green or Thomas shot Price was critical to Mr. Gaines's defense. The state cannot

show here that the improper exclusion of evidence that Green was likely armed was harmless beyond a reasonable doubt. *Elliott*, 121 Wn. App. at 410.

The exclusion of this critical evidence prejudiced Mr. Gaines. *Elliott*, 121 Wn. App. at 410. His convictions must be reversed and the case remanded with instructions to allow testimony about Green's habit of carrying a small gun. *Id.*

V. THE COURT ERRED BY DENYING MR. GAINES'S MOTION TO DISMISS BASED ON GOVERNMENTAL MISMANAGEMENT.

Thomas and Mr. Gaines were originally charged as co-defendants in Price's murder. They proceeded to a joint trial and completed five days of jury selection. RP (9/16/13) 108. The jury was sworn in. RP (9/9/13) 35.

After that, pursuant to a court order, the lead detective finally created a report from her old notes of an interview with Thomas. RP (9/16/13) 104. During the interview Thomas had admitted to the detective that she lied in her previous statement. RP (9/12/13) 93. She also drew a diagram of the scene in the alley, including the locations of each of the players. RP (9/12/13) 93. Still, the prosecutor claimed that the report did not contain any relevant new information. (9/12/13) 94.

The emergence of the report also induced Thomas to make a new proffer statement to the prosecutor. RP (9/12/13) 87. She drew another diagram of the scene in the alley. RP (3/27/14) 743; Ex. 76.

The prosecutor then moved to dismiss Thomas's murder charge with prejudice. RP (9/12/13) 81. He said that her new statements, in conjunction with her "willingness to talk," led him to believe that he could not prove the state's case against her. RP (9/12/13) 83.

Mr. Gaines moved to dismiss his charge under CrR 8.3 for governmental misconduct. RP (9/16/13) 101-102. He explained that the detective's failure to create her report until after trial had started forced him to choose between his rights to a speedy trial[20] and to adequately prepared counsel. RP (9/16/13) 108.

The court found that Detective Chittick's extremely late report constituted governmental mismanagement. RP (9/16/13) 120-121. The court also found a causal relationship between the mismanagement and Thomas's very late proffer statement, which contained significant new information. RP (9/16/13) 121. Even so, the court found that dismissal was not required because the court still had the opportunity to cure the prejudice – presumably by declaring a mistrial. RP (9/16/13) 122.

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[20] Mr. Gaines had been in custody for 474 days by this point. Order of Continuance (8/6/13), Supp. CP. The deadline on his speedy trial clock was the day his trial began. Order of Continuance (8/6/13), Supp. CP.

The court did not consider whether the prosecutor's actions of proceeding to trial against Thomas apparently without enough evidence to convict her also demonstrated mismanagement. RP (9/16/13) 120-122.

Mr. Gaines then moved for a mistrial, which was granted. RP (9/16/13) 123, 127.

A trial court may dismiss a criminal prosecution based on "arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." CrR 8.3(b).

A finding of arbitrary action or governmental misconduct does not require evil or dishonest action on the part of officials. *State v. Brooks*, 149 Wn. App. 373, 384, 203 P.3d 397 (2009). Simple mismanagement is enough. *Id.*

Here, the trial court has already found that Detective Chittick's failure to write up her interview with Thomas constituted mismanagement. RP (9/16/13) 120-121.

But the prosecutor also mismanaged the case in a manner that endangered Mr. Gaines's rights to a speedy trial, adequately-prepared counsel, and freedom from double jeopardy. He appears to have moved forward with Thomas's charge despite a lack of evidence necessary to

convict her. Indeed, he let the case get all the way past jury selection before realizing his mistake.

Thomas's new statement cannot excuse the prosecutor's mismanagement. The prosecutor, himself, argued that the statement contained only information that had already been provided by other witnesses. RP (9/12/13) 94. He said that it did not change the nature of the case. RP (9/12/13) 94. If the prosecutor did not have enough evidence to convict Thomas after she gave the statement, then he did not have enough evidence beforehand. Indeed, it would be highly unusual for a prosecutor to dismiss a murder prosecution based on the defendant's denials.

Dismissal under CrR 8.3 also requires a showing of prejudice to the acccused's right to a fair trial. *Brooks*, 149 Wn. App. at 384. Such prejudice does not require a showing that the government withheld evidence that could have changed the outcome of the trial. *Id.* at 389-90. Prejudice to other rights, such as to a speedy trial or to adequately prepared counsel, is sufficient. *Id.* at 384.

Here, governmental misconduct prejudiced Mr. Gaines's rights to a speedy trial, to adequately-prepared counsel, and to freedom from double jeopardy.[21] He was forced to seek a mistrial, further delay his trial, and

[21] Double jeopardy is not generally implicated when defense counsel requests a mistrial. *State v. Lewis*, 78 Wn. App. 739, 745, 898 P.2d 874 (1995). However, an exception exists for situations in which governmental action leaves the accused with no choice but to ask to

give up his right to be free from double jeopardy. His only other option would have been to continue with unprepared counsel and to permit the jury to infer that he was more likely guilty based on the dismissal of Thomas's charge and her testimony against him.

The trial court abused its discretion by denying Mr. Gaines's motion to dismiss the case based on governmental mismanagement. *Brooks*, 149 Wn. App. at 384. His convictions must be reversed. *Id.*

VI. THE TRIAL COURT ERRED BY ORDERING MR. GAINES TO PAY $1900 IN LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY.

Mr. Gaines was found indigent at the end of trial. CP 500-02. The case resulted in an order that he pay $5,750 in restitution. CP 487. Still, the court also ordered him to pay an additional $1,900 in other legal financial obligations (LFOs).

The court appeared to rely on boilerplate language in the Judgment and Sentence stating, essentially, that every offender has the ability to pay LFOs. CP 487. But the court did not conduct any particularized inquiry into Mr. Gaines's financial situation at sentencing or at any other time. RP

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dismiss the jury. *Id.* at 742 (*citing Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)).

Mr. Gaines's right to be free from double jeopardy is implicated here because the official mismanagement disregarded the substantial likelihood that he would be forced to seek a mistrial.

(6/5/14) 1810-1817. The court erred by ordering Mr. Gaines to pay LFOs absent any indication that he had the means to do so.

The legislature has mandated that "[t]he court *shall not* order a defendant to pay costs unless the defendant is or will be able to pay them." RCW 10.01.160(3); *State v. Blazina*, --- Wn.2d ---, 344 P.3d 680, 685 (March 12, 2015) (emphasis added by court).

This imperative language prohibits a trial court form ordering LFOs absent an individualized inquiry into the person's ability to pay. *Id.* Boilerplate language in the Judgment and Sentence is inadequate because it does not demonstrate that the court engaged in an individualized analysis. *Id.*

The court must consider personal factors such as incarceration and the person's other debts, including restitution. *Id.*

Here, the court failed to conduct any meaningful inquiry into Mr. Gaines's ability to pay LFOs. RP (6/5/14) 1810-1817. The court did not consider his financial status in any way. RP (6/5/14) 1810-1817. Indeed, the court also found Mr. Gaines indigent on the same day that it imposed $1,900 in LFOs. CP 500-02.

Had the court considered the factors mandated by the Supreme Court in *Blazina*, Mr. Gaines's lengthy incarceration and the fact that he

was also ordered to pay $5,750 in restitution would have weight heavily against a finding that he had the ability to pay additional LFOs. CP 488.

In fact, the *Blazina* court suggested that an indigent person would likely never be able to pay LFOs. *Id.* ("[I]f someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs").

RAP 2.5(a) permits an appellate court to review errors even when they are not raised in the trial court. RAP 2.5(a); *Blazina*, --- Wn.2d ---, 344 P.3d at 683. The *Blazina* court recently chose to review the exact LFO-related issue raised in Mr. Gaines's case, finding that "National and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." *Id.*

The Supreme Court noted the significant disparities both nationally and in Washington in the administration of LFOs and the significant barriers they place to reentry of society. *Id.* at 683-85. This court should follow the Supreme Court's lead and consider the merits of Mr. Gaines's LFO claim even though it was not raised below.

The court erred by ordering Mr. Gaines to pay $1,900 in LFOs absent any showing that he had the means to do so. *Blazina*, --- Wn2d at ---, 344 P.3d at 685. This requires remand for a new sentencing hearing. *Id.*

CONCLUSION

The trial court violated Mr. Gaines's rights to a due process and to an impartial jury by denying his motion for a mistrial after the entire jury was exposed to extrinsic information that was false and prejudicial. The court also violated those rights by dismissing Juror 2 after the court became aware of his view of the merits of the case.

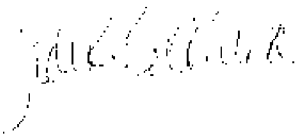
The prosecutor committed flagrant and ill-intentioned misconduct during closing, by putting words in Mr. Gaines's mouth that were not in evidence. The court violated Mr. Gaines's right to confront adverse witnesses by prohibiting him from cross-examining key state witnesses about sources of bias and motivation to lie.

The court violated Mr. Gaines's right to present a defense by precluding him from eliciting relevant, admissible evidence of Green's habit of carrying a gun. Finally, the court erred by denying Mr. Gaines's motion to dismiss based on governmental mismanagement. Mr. Gaines's convictions must be reversed.

Alternatively, the court erred by ordering Mr. Gaines to pay $1,900 in legal financial obligations without inquiring into whether he had the means to do so. This case must be remanded for a new sentencing hearing.

Respectfully submitted on April 24, 2015,

BACKLUND AND MISTRY



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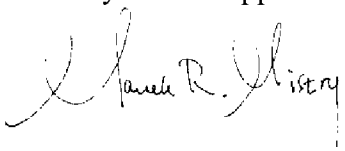

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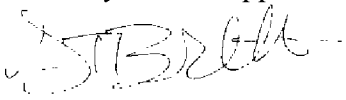

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Devennice Gaines, DOC #729910
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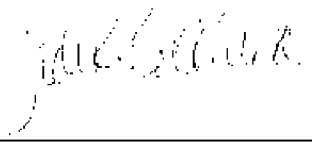
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
pcpatcecf@co.pierce.wa.us

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 24, 2015.



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